16

Office - Supreme Court, U.
FILED
AUG 28 1953
HAROLD B. WILLEY, Cle

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1953.

No. 298

BERTIE C. FORBES,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

WATSON WASHBURN,
Counsel for Petitioner,
36 West 44th Street,
New York 36, N. Y.

THE COURT PRESS, N. Y. C.

INDEX.

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statute Involved	2
Statement	2
Specification of Error to Be Urged	3
Reasons for Granting the Writ	4
Conclusion	6

TABLE OF CASES CITED:

Bingham v. *Comm.*, 325 U. S. 365 ..... 5, 6

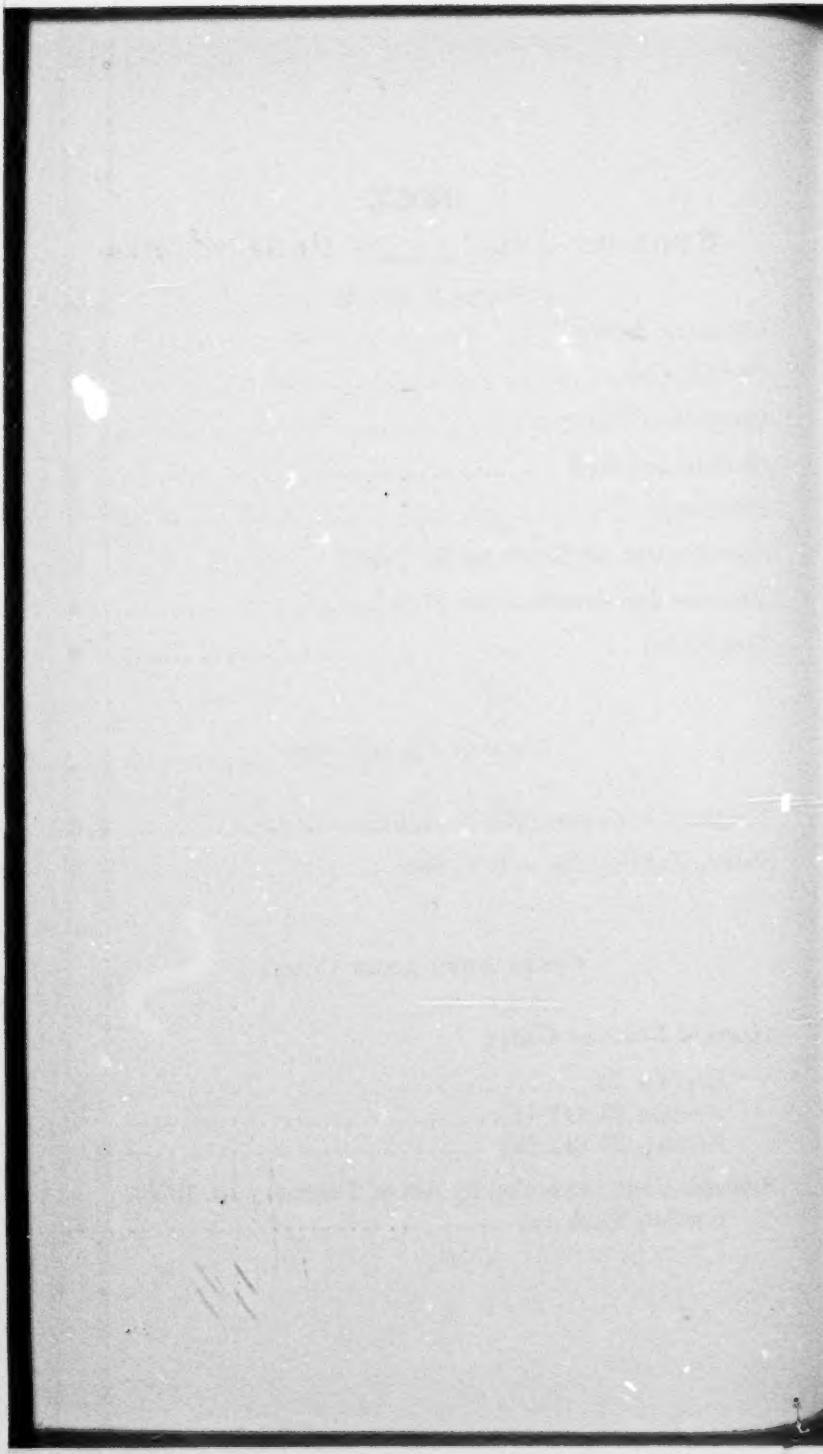
Smith, Luther Ely, 3 T. C. 696 5

OTHER AUTHORITIES CITED:

Internal Revenue Code:

Section 23 2
Section 23 (a) (1) 3
Section 23 (a) (2) 2, 4, 5

Judicial Code (amended by Act of February 13, 1925), Section 240A 2



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1953.

No.

BERTIE C. FORBES,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit entered in this case.

Opinions Below.

The findings of fact and opinion of the Tax Court (10a-18a)* are reported at 18 T. C. 321. The affirming opinion of the Court of Appeals is reported at 204 F. 2d 777.

---

* All undesignated references are pages of the Record.

Jurisdiction.

The judgment of the Court of Appeals was entered on June 3, 1953. The jurisdiction of this Court is invoked under § 240A of the Judicial Code as amended by the Act of February 13, 1925.

Question Presented.

Was an investor's contribution to Investors League, Inc., a nation-wide organization with more than ten thousand members, chartered and operated to protect investors' interests, deductible under Section 23 (a) (2) I. R. C. as an ordinary and necessary non-business expense paid for the conservation of his investments?

Statute Involved.

I. R. C., Section 23—*Deductions from Gross Income* * * * (a) (2) *Non-Trade or Non-Business Expenses.*—In the case of an individual, all the ordinary and necessary expenses paid or incurred during the taxable year for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income.

Statement.

The taxpayer in 1946 contributed to Investors League, Inc.

The purposes of this organization were correctly summarized by the Court of Appeals as follows:

> "To build up a nationwide organization designed to bring about fair play for investors, life insurance policyholders, savings depositors, home owners, small business men and other property owners; to advocate the preservation of the existing private enterprise system; to conduct economic studies and research and to publicize the results thereof; to express publicly the League's attitude toward existing or proposed legislation affecting the interests of its members as investors; to concern itself with matters of mismanagement, or inconsiderate treatment of investors, or labor relations, involving principles which affect the interests of members as investors; and to promote genuine industrial democracy as distinguished from merely theoretical democracy in industry."

The Court of Appeals correctly found that "in 1946 it had more than 10,000 members" and that "its actual activities in 1946 conformed to the objectives stated in its charter."

Specification of Error to Be Urged.

The Court of Appeals erred in holding that whereas contribution by business men to business organizations such as chambers of commerce, etc., designed to protect the general interests of business, are deductible as ordinary and necessary business expenses under Section 23 (a) (1), contributions by an investor to the Investors League, Inc. designed to

protect the general interests of investors are not deductible as ordinary and necessary non-business expenses under Section 23 (a) (2).

Reasons for Granting the Writ.

The learned courts below both found that "there was no evidence of any understanding that the League would give a *quid pro quo* for the taxpayer's contribution" but this seems merely an erroneous conclusion of law at variance with the correct factual finding that the League carried out the purposes for which it was organized,—that is, to protect the interests of investors. Clearly, this was what both the taxpayer and the League understood that he was paying for, and this is precisely what he got.

The essence of the holdings below is found in the following sentences from the opinion of the Court of Appeals:

> "The other group of cases relied on involved contributions to chambers of commerce, trade associations, or similar organizations. These are held deductible under § 23 (a) (1) as *business* expenses, and the applicable Regulation permits deduction of 'expenditures directly connected with or pertaining to the taxpayer's trade or business.' Contributions to chambers of commerce or trade organizations may well be thought to be an 'ordinary and necessary' expense 'pertaining' to the contributor's trade or business. But we agree with the Tax Court that such decisions are not authority for allowing a deduction in the case at bar."

We respectfully submit that the decision is clearly at variance with Section 23 (a) (2), which was interpreted by this Court in *Bingham* v. *Comm.*, 325 U. S. 365, 373, 374 as follows:

> "Section 23 (a) (2) is comparable and *in pari materia* with § 23 (a) (1), authorizing the deduction of business or trade expenses. Such expenses need not relate directly to the production of income for the business. It is enough that the expense, if 'ordinary and necessary,' is directly connected with or proximately results from the conduct of the business. *Kornhauser* v. *United States, supra,* 152-153; *Commissioner* v. *Heininger, supra,* 470-471. The effect of § 23 (a) (2) was to provide for a class of non-business deductions co-extensive with the business deductions allowed by § 23 (a) (1), except for the fact that since they were not incurred in connection with a business, the section made it necessary that they be incurred for the production of income or in the management or conservation of property held for the production of income."

As was stated in *Luther Ely Smith,* 3 T. C. 696, 703:

> "Cases upholding the deductibility of contributions to trade organizations to promote the interests of the particular trade or business group to which the respective petitioner belonged are too numerous to cite."

The analogy between the *business* expenses allowed above, which the Court of Appeals conceded to be properly allowable, and the *non-business* expenses involved in this case, seems complete and inescapable.

We believe that certiorari should issue because the decision below is apparently in conflict with this Court's decision in *Bingham* v. *Commissioner, supra,* and also because the erroneous decision affects not only the thousands of members of Investors League, Inc. throughout the nation, but also the millions of investors, life insurance policyholders, and other like citizens who may wish to unite to protect themselves, and who should not be denied tax deductions which are allowed to corresponding organizations of business men and corporations.

We believe that the decision below involves an important question of Federal law that should be reviewed by this Court.

Conclusion.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

WATSON WASHBURN,
Counsel for Petitioner.

August 26, 1953.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute and Regulation involved	2
Statement	2
Argument	5
Conclusion	7
Appendix	8

CITATIONS

Cases:

Bingham, Trust of v. *Commissioner*, 325 U.S. 365	5, 6
Deputy v. *du Pont*, 308 U.S. 488	5
Textile Mills Corp. v. *Commissioner*, 314 U.S. 326	7

Statute:

Internal Revenue Code, Sec. 23 (26 U.S.C. 1946 ed., Sec. 23)	5, 8

Miscellaneous:

H. Rep. No. 2333, 77th Cong., 2d Sess., p. 75 (1942-2 Cum. Bull. 372)	5
S. Rep. No. 1631, 77th Cong., 2d Sess., p. 88 (1942-2 Cum. Bull. 504)	5
Treasury Regulations 111:	
Sec. 29.23(a)-15	5, 8
Sec. 29.23(o)-1	7, 10

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 298

BERTIE C. FORBES, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 23-26) is reported at 204 F. 2d 777. The findings of fact and the opinion of the Tax Court (R. 10-18) are reported at 18 T. C. 321.

JURISDICTION

The judgment of the Court of Appeals was entered on June 3, 1953. (R. 28.) The petition for a writ of certiorari was filed on August 28, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether $1,000 paid in 1946 by the taxpayer to Investors League, Inc., was a non-business expense within the meaning of Section 23 (a) (2) of the Internal Revenue Code.

STATUTE AND REGULATION INVOLVED

The pertinent sections of the statute and of the regulation involved will be found in the Appendix, *infra*, pp. 8-11.

STATEMENT

The taxpayer, publisher and editor of Forbes Magazine and the author of a syndicated newspaper column—both of which deal with business, finance, and economics—was a founder in 1942 of a non-profit, non-partisan corporation known as Investors League, Inc. He was a director of the corporation and its first president, serving in the latter capacity through 1948. (R. 11-13.)

The league's certificate of incorporation recites that its objects and purposes are (R. 14-15):

> (1) To build up a nationwide organization which shall vigorously conduct activities designed to bring about fairplay for:
>
> Investors
> Life insurance policyholders
> Savings depositors
> Homeowners
> Small business men
> Other property owners
>
> (2) To advocate by every lawful means the preservation of the existing private enterprise system.

(3) To conduct economic studies and research; and to inform the public and the members of the Association of the results thereof.

(4) To cooperate in establishing local bodies having similar purposes throughout the country.

(5) To express publicly the attitude of the League on any legislation or proposed legislation, including tax laws, affecting the interests of its members as investors, life insurance policyholders, savings depositors, homeowners, small business men and other property owners.

(6) To participate in an appropriate and lawful capacity, and without compensation or pecuniary profit to the Association or its officers, in matters involving questions of mismanagement, or inconsiderate treatment of investors, or labor relations where principles are involved which affect the interests of members as investors, life insurance policyholders, savings depositors, homeowners, small business men and other property owners. The attitude of the League may or may not be the same as that of any government agency which may participate in such matters.

(7) To advocate and promote a far greater degree of genuine democracy in industry, as distinguished from merely theoretical democracy in industry.

During the taxable year 1946, the League published a monthly bulletin for distribution to its members and others. Not operated exclusively for educational purposes (R. 15), the League was in large part devoted to influencing legislation

(R. 17). Support for its activities came from contributions—ranging from $45,000 for the fiscal year ending June 30, 1946 (Resp. Ex. G), to $57,000 for 1947 (Resp. Ex. H)—from its ten thousand to twelve thousand members scattered throughout the United States (R. 13).

The taxpayer was an investor in security transactions amounting to $101,750, and received $4,677.18 in dividends, $1,668.33 in interest, and $1,844.56 in trust fund income in 1946 (R. 12). In that year he made a contribution of $1,000 to the League (R. 13), and attempted to deduct that sum as a non-business expense under Section 23 (a) (2) of the Internal Revenue Code (Appendix, *infra*, p. 8).

The disallowance of the deduction by the Commission was sustained by the Tax Court, which found that none of the above income was directly or remotely attributable to information or services provided by the League and that none of the taxpayer's $44,747.65 capital gains income was realized because of any information or services supplied by the League. The Tax Court further found that the $1,000 was not directly or remotely helpful or appropriate to, had no proximate relation to, and did not constitute an ordinary and necessary expense for, the production or collection of income, or, the management, conservation, or maintenance of property held for the production of income. (R. 12-15.)

The Court of Appeals affirmed (R. 24-26), specifically pointing out that the record supported the findings of the Tax Court (R. 25).

ARGUMENT

This case presents no question calling for review by this Court. There is no conflict of decisions and the issue is merely one of fact, as to which both courts below concurred.

Section 23 (a) (2) of the Internal Revenue Code allows an individual taxpayer to deduct from his gross income all ordinary and necessary expenses paid or incurred during the taxable year for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income. The Treasury Regulations (which petitioner does not appear to challenge) require that non-business expenses to be deductible must be ordinary and necessary expenditures, bearing a reasonable and proximate relation[1] to the production or collection of taxable income or to the management, conservation, or maintenance of property held for the production of income. Section 29.23 (a)-15 of Treasury Regulations 111 (Appendix, *infra*, pp. 8-10).[2]

As both courts below held (R. 16, 25), taxpayer was able to show no evidence of a "reasonable and proximate relation" between his $1,000 contribution to the League and his security holdings. Thus, although the League published a monthly bulletin, there is no suggestion that this bulletin was

---

[1] That there must be such a proximate relation is implicit in the statutory language "expenses paid or incurred * * *." *Deputy* v. *DuPont*, 308 U.S. 488, 494; see also *Trust of Bingham* v. *Commissioner*, 325 U.S. 365, 370.

[2] See also H. Rep. No. 2333, 77th Cong., 2d Sess., p. 75 (1942-2 Cum. Bull. 372, 430); S. Rep. No. 1631, 77th Cong., 2d Sess., p. 88 (1942-2 Cum. Bull. 504, 571).

in the nature of an investment counseling service, nor any suggestion that the contribution was in anticipation of benefits to be derived from information in the bulletin. Characterized by taxpayer himself as "not concrete, * * * intangible" (Tr. 153-155), the results aimed for by the League related, not to property held by the taxpayer for the production of income, but to the "private enterprise system" generally. Clearly, this is not the type of expenditure embraced by the statutory standard.

In like vein, petitioner's attempt (Pet. 5-6) to find an inconsistency between the decision below and the decision of this Court in *Trust of Bingham* v. *Commissioner,* 325 U. S. 365, is without merit. In *Bingham,* the issue was whether expenses incurred by trustees in contesting an income tax deficiency assessment and in winding up the trust after its expiration were expenses for the "management of property held for the production of income." Holding that such expenses were allowable under Section 23 (a) (2), this Court expressly stated that such expenses must be "reasonable in amount and must bear a reasonable and proximate relation to the management of property held for the production of income." 325 U.S. at 370. As both courts below held, the payments in question here did not conform to that standard.[8]

---

[8] The Tax Court further found that the League devoted much of its activities to influencing legislation (R. 17). Although both courts below found it unnecessary to reach the question, it is clear that sums of money spent for lobbying

CONCLUSION

The decision below is correct and there is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT L. STERN,
Acting Solicitor General.
H. BRIAN HOLLAND,
Assistant Attorney General.
ELLIS N. SLACK,
LEE A. JACKSON,
ROBERT B. ROSS,
Special Assistants to the Attorney General.

OCTOBER, 1953.

---

purposes or the promotion or defeat of legislation are not deductible from gross income. *Textile Mills Corp.* v. *Commissioner*, 314 U. S. 326; see Treas. Regs. 111, Sec. 29.23(o)-1 (Appendix, *infra*, pp. 10-11).

APPENDIX

Internal Revenue Code:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) [as amended by Sec. 121 (a), Revenue Act of 1942, c. 619, 56 Stat. 798] *Expenses.*—

* * * * *

(2) *Non-trade or Non-business Expenses.*—In the case of individual, all the ordinary and necessary expenses paid or incurred during the taxable year for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income.

* * * * *

(26 U.S.C. 1946 ed., Sec. 23.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.23(a)-15. *Nontrade or Nonbusiness Expenses.*—(a) *In general.*—Subject to the qualifications and limitations in chapter 1 and particularly in section 24, an expense may be deducted under section 23(a)(2) only upon the condition that:

(1) it has been paid or incurred by the taxpayer during the taxable year (i) for the production or collection of income which, if and when realized, will be required to be included in income for Federal income tax

purposes, or (ii) for the management, conservation, or maintenance of property held for the production of such income; and

(2) it is an ordinary and necessary expense for either or both of the purposes stated in (1) above.

The term "income" for the purpose of section 23(a)(2) comprehends not merely income of the taxable year but also income which the taxpayer has realized in a prior taxable year or may realize in subsequent taxable years; and is not confined to recurring income but applies as well to gains from the disposition of property. For example, if defaulted bonds, the interest from which if received would be includible in income, are purchased with the expectation of realizing capital gain on their resale, even though no current yield thereon is anticipated, ordinary and necessary expenses thereafter incurred in connection therewith are deductible. Similarly, ordinary and necessary expenses incurred in the management, conservation, or maintenance of a building devoted to rental purposes are deductible notwithstanding that there is actually no income therefrom in the taxable year, and regardless of the manner in which or the purpose for which the property in question was acquired. Expenses incurred in managing, conserving, or maintaining property held for investment may be deductible under this provision even though the property is not currently productive and there is no likelihood that the property will be sold at a profit or will otherwise be pro-

ductive of income and even though the property is held merely to minimize a loss with respect thereto. The expenses, however, of carrying on transactions which do not constitute a trade or business of the taxpayer and are not carried on for the production or collection of income or for the management, conservation, or maintenance of property held for the production of income, but which are carried on primarily as a sport, hobby, or recreation are not allowable as nontrade or nonbusiness expenses.

Expenses, to be deductible under section 23 (a)(2), must be "ordinary and necessary," which presupposes that they must be reasonable in amount and must bear a reasonable and proximate relation to the production or collection of taxable income or to the management, conservation, or maintenance of property held for the production of income.

* * * * *

SEC. 29.23(o)-1. *Contributions or Gifts by Individuals.*—

* * * * *

A donation made by an individual to an organization other than one referred to in section 23(o) which bears a direct relationship to his business and is made with a reasonable expectation of a financial return commensurate with the amount of the donation may constitute an allowable deduction as business expense.

Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses, are not deductible from gross income.

* * * * *

☆ U. S. GOVERNMENT PRINTING OFFICE: 1955 273988 800